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No. 92-801

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMODITIES EXPORT CO.,

Petitioner,

V

THE UNITED STATES,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Reply of Commodities Export Co. To Government's Brief in Opposition

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COMMODITIES EXPORT CO.,

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THE UNITED STATES,

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REPLY OF COMMODITIES EXPORT CO. TO GOVERNMENT'S BRIEF IN OPPOSITION

The Government's judgment for damages against Petitioner Commodities Export Co. ("Commodities") was reversed by the Federal Circuit (A4)[1] "[b]ecause the United States did not file its action within the six year statute of limitations...."

The Federal Circuit also specifically concluded that (A14): "The Court of International Trade ["CIT"] properly asserted jurisdiction over this action."

The Government now argues that this Court is without jurisdiction because Petitioner prevailed below. This argu-

[1]References to page numbers of the Appendix contained in Commodities' Petition for Writ of Certiorari are preceded by "A" followed by the page numbers. Thus, "A4" is a reference to page 4 of the Appendix in Commodities' Petition for Writ of Certiorari.

ment is both factually and legally flawed.

As the record below amply demonstrates, this case was never about $6,024.69 in damages. The central issue below was the jurisdiction of the CIT over this case and *a fortiori* over the entire duty-free industry. Indeed, Commodities' initial response to the Government's complaint was a motion to dismiss based on the absence of jurisdiction in the CIT (A21).

Deposit Guaranty Nat'l Bank v Roper, 445 US 326 (1980) relied on by the Government in fact provides the basis for a finding of jurisdiction in this case. To be sure, the Court observed (at 333) that: "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." (Citations omitted.) But even this language without more, cuts in favor of Commodities here who most assuredly did not receive the relief it sought.

The *Deposit Guaranty* court examined *Electrical Fittings Corp v Thomas & Betts Co,* 307 US 241 (1939) in which although a claim of patent infringement was denied the patent was found to be valid. The party charged with the infringement appealed. "Respondents filed a motion to dismiss the appeal 'based on the ground that the appeal can raise no questions not already moot because of the fact that the [petitioners] have already been granted in the dismissal of the bill all the relief to which they are entitled.'" *Deposit Guaranty,* 334. This is precisely the argument made by the Government here. The Court of Appeals in *Electrical Fittings* accepted the argument. The Supreme Court did not. Its reasoning was quoted with approval in *Deposit Guaranty,* 335:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the

> decree. But here the decree itself purports to adjudge the validity of [the patent], and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this court has, to entertain the appeal, not for the purpose of passing on the merits but to direct the reformation of the decree." 307 U.S., at 242 (footnotes omitted).

In *Deposit Guaranty* as in *Electrical Fittings*, the mootness argument was rejected. The logic on which those decisions were based is equally applicable here.

Public Service Commission v Brashear Freight Lines, Inc, 306 US 204 (1939) relied on by the Government has no application here. Injunction sought by plaintiffs was denied. Defendants appealed because the trial court refused to consider their counterclaim. This Court decided (at 206) that defendant "as the successful party below has no standing to appeal from the decree denying the injunction." (Citations omitted.)

Here, neither the trial court nor the court of appeals refused to consider the critical jurisdictional issue raised by Commodities. Instead, that issue was considered and decided against Commodities. *New York Telephone Co v Maltbie*, 291 US 945 (1934) adds nothing to *Brashear Freight* and *Gunn v University Committee To End the War*, 399 US 383, 390 n 5 (1970) cited by the Government, repeats subjunctively, the holding in *Brashear Freight*.

California v Rooney, 483 US 307, 311-314 (1987) relied on by the United States as instructive in the case at bar is no assistance to the Government, because, as this Court observed (at 314): "As it stands, we have no way of knowing what the California Supreme Court's position on the issue of trash

searches currently is."

In the case at bar, the position of the court below on the jurisdiction of the CIT over duty-free stores is not in doubt. It has been litigated and decided. The propriety of that decision is now before this Court.

More to the point on the issue raised here is *International Broth of Elec Workers v ICC*, 862 F2d 330, 334 (DC Cir 1988) in which the Court observed that: "This case comes to us in a somewhat unusual posture, because the ICC upheld the union's position on the merits of the arbitration award."

Because the main focus of the union's defense was *lack* of jurisdiction and because it lost on that issue, appellate review was deemed appropriate, *International Broth of Elec Workers*, 334:

> Because of the ICC's decision to review arbitration awards, the union will be subject to agency review in future cases involving disputes over employee protective conditions.
>
> *This injury is similar to interests held to be sufficient to confer appellate standing on an otherwise prevailing party.* (Emphasis added, citations omitted.)

That decision is dispositive of the precise issue presented here. The finding of jurisdiction in the CIT over duty-free stores spread throughout the nation is at least as compelling as the jurisdictional issue in *International*. Had the Federal Circuit decided the issue of the CIT's subject matter jurisdiction in Commodities' favor, it would never have gotten to the Statute of Limitations issue.

The merits, addressed briefly by the Government, are responded to in Commodities' Petition for Writ of Certiorari.

CONCLUSION

This is the *first* duty-free store case ever filed in the CIT.

Pursuant to SCR 10.1(c), the Federal Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court." Duty-free stores operate exclusively in export. The Federal Circuit's jurisdictional ruling has fundamentally and erroneously redefined the entire industry as "importers" conducting "import transaction[s]" with bonds relating to the "importation of merchandise" as required by 28 USC 1582(2).

For the foregoing reasons and for those set forth in Commodities' initial Petition, the writ of certiorari should issue to review the Federal Circuit's ruling affirming the subject matter jurisdiction of the CIT under 28 USC 1582(2) as it apples to duty-free stores.

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